STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

RAYMOND ~~ALLEN~~ MCCULLER,

Defendant-Appellant.

Supreme Court No. SC_NO

Court of Appeals No. 250000

Lower Court No. 02-183044FH

OAKLAND COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

DESIREE M. FERGUSON (P34904)
Attorney for Defendant-Appellant

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Raymond Allen McCuller was convicted of Assault with Intent to do Great Bodily Harm, after a May 8-9, 2003 jury trial in Oakland County Circuit Court, before the Honorable Richard D. Kuhn. On June 17, 2003, the court sentenced Mr. McCuller to two to fifteen years' imprisonment.

Mr. McCuller filed an appeal of right. He first moved for resentencing in the trial court, which was denied. He then appealed to the Court of Appeals. On January 11, 2004, the Court of Appeals affirmed his conviction and sentence in an unpublished per curiam decision. [Appendix A]. This is Mr. McCuller's application for leave to appeal the Court of Appeals' decision.

The Court of Appeals' decision is clearly erroneous, and will cause material injustice, if not reviewed by this Court. MCR 7.302 (B)(5). In particular, the Court of Appeals erred in refusing to grant resentencing based on the United States Supreme Court decision in *Blakely v Washington*, 542 US ___; 124 SCt 2531; ___ L Ed 2d ___ (2004), that it is a violation of due process to impose an enhanced sentence based on facts neither admitted by the defendant nor found by a jury. As the basis for its denial of resentencing, the Court of Appeals cited this Court's opinion in *People v Claypool*, 470 Mich 715, 730; 684 NW2d 278 (2004), that *Blakely* does not apply to the sentencing guidelines scheme in Michigan.

The Court of Appeals' decision is clearly erroneous because, whatever the merit of the argument that *Blakely* does not apply in the typical circumstance involving a minimum and a maximum sentence, it does not obtain in the instant case, where Mr. McCuller ought to have been placed in an intermediate cell. An intermediate cell, just like the sentences provided under the Washington guidelines in *Blakely,* provides for but one sentence, such as probation or jail, and does not permit a sentencing range consisting of a minimum and a maximum sentence.

Therefore, the argument that *Blakely* does not apply where the defendant belongs in an intermediate sanction is fallacious.

Because the issue in *Blakely* was not presented to the Court in *Claypool,* litigants have been deprived of the important opportunity to fully brief and argue whether and to what extent the Washington sentencing guidelines treated by the *Blake*ly decision are distinct from or similar to those presented under the Michigan guidelines. Whatever the arguments may be in that regard, however, it is clear that the situation in the present case, in which Mr. McCuller must properly be placed in an intermediate cell, is precisely the same as that presented in *Blakely.*

Under these circumstances, Mr. McCuller must be resentenced to an intermediate sanction for assault with intent to commit murder. Mr. McCuller prays that this Honorable Court grant leave to appeal the Court of Appeals' decision with respect to this narrow and novel question presented in Mr. McCuller's case, and remand for resentencing.

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STATEMENT OF QUESTIONS PRESENTED

I. WAS MR. MCCULLER DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT PRECLUDED HIM FROM INTRODUCING EVIDENCE TO ESTABLISH THE BIAS AND MOTIVE FOR FABRICATION OF A CRITICAL PROSECUTION WITNESS?

The Court of Appeals answered, "No."

The Trial Court answered, "No."

Defendant-Appellant answers, "Yes."

II. IS MR. MCCULLER ENTITLED TO RESENTENCING WHERE HIS SENTENCE WAS UNLAWFULLY AND UNCONSTITUTIONALLY ENHANCED ON THE BASIS OF UNPROVEN ALLEGATIONS; WHERE HIS MINIMUM SENTENCE CONSTITUTES A DEPARTURE FROM THE CORRECT SENTENCING GUIDELINES SCORE; AND WHERE UNDER HIS CORRECT GUIDELINES HE MUST BE GIVEN AN INTERMEDIATE SANCTION SUCH AS PROBATION?

The Court of Appeals answered, "No."

The Trial Court answered "No" with regard to offense variable 3.

The Trial Court has given no answer with regard to offense variables 1 and 2.

Defendant-Appellant answers, "Yes".

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Defendant-Appellant Raymond Allen McCuller was convicted of Assault with Intent to do Great Bodily Harm [MCL 750.84], after a May 8-9, 2003 jury trial in Oakland County Circuit Court, before the Honorable Richard D. Kuhn. On June 17, 2003, the court sentenced Mr. McCuller to two to fifteen years' imprisonment.

Mr. McCuller filed an appeal of right. He first moved for resentencing in the trial court, based in part on challenges to the points assessed under Offense Variable 3 of the sentencing guidelines. The motion was denied. He then appealed to the Court of Appeals. On January 11, 2004, the Court of Appeals affirmed his conviction and sentence in an unpublished per curiam decision. [Appendix A]. This is Mr. McCuller's application for leave to appeal the Court of Appeals' decision.

The charges arose out of the beating of Larry Smith on September 25, 2001, in Hazel Park. Police arrested Mr. McCuller after a witness implicated Mr. McCuller in the assault. Mr. McCuller maintained that he was falsely identified as the assailant.

Larry Smith testified that he was at the Sholtz Bar with Shanna Cox, when she made a telephone call to Mr. McCuller. Later, somebody entered the bar and said that some kids were messing with Smith's dog, which was outside in Smith's car. Smith said that he went outside, opened the car door, "heard or felt something," looked around and saw Mr. McCuller swinging an object at him, such as a bat, pipe or club. He was hit in the back of his head and knocked unconscious. His next recollection was waking up in the hospital. [Trial 5/8/03, pp 69-73].

As a result of the assault, Mr. Smith said he incurred a broken nose, broken cheek bone, broken right eye socket, fractured head, right lower teeth knocked out, and a collapsed right inner ear wall. He acknowledged, however, that he had been partially deaf in both ears since he was five. His teeth were still missing. He suffered from a closed head injury and a concussion. [Trial 5/8/04 pp 75-77, 97].

Mr. Smith had had a romantic relationship with Shanna Cox in 1996 and 1997. Before the incident, she had been living with Mr. McCuller until August of 2001, when they had an argument. At the time of the incident in September of 2001, she was living with Mr. Smith, and he said they were lovers. [Trial 5/8/03, pp 64-65, 106-107].

Mr. Smith initially told Officer Holka that he did not know who hit him. A day or two after the incident, Mr. Smith asked Shanna Cox what had happened to him. At that point, Cox had gone back to Mr. McCuller. Mr. Smith did not name Mr. McCuller as his assailant until two or three days after the incident occurred. A day or two after getting out of the hospital, Mr. Smith first told Sergeant Barner that Mr. McCuller assaulted him. [Trial 5/8/03, pp 105-114].

Mr. Smith denied telling Ms. Cox after he got out of the hospital that, "this will only get worse," "I am not going to stop until you talk to me," "you can tell Al if you want, but I need some answers," "otherwise I won't quit until he is in jail," "it ain't over by a long shot or actually until six feet," "you better make up because time is running faster and faster," or that he would kill for her. [Trial 5/8/03, pp 116-117].

Mr. Smith admitted that he had had two or three beers when incident occurred, and that he was also under the influence of methadone. [Trial 5/8/03, pp 93-94]. He denied knowing that methadone caused visual disturbances or disorientation when mixed with alcohol. He did not

recall telling the admitting physician at the hospital that he drank two or three packs of beer per day or that he used cocaine or intravenous drugs. [Trial 5/8/03, pp 99-104].

Officer Paul Holka testified that, when he arrived at the Sholtz Bar, he found Larry Smith kneeling in the parking lot, bleeding profusely from the head. He was incoherent and unresponsive. Officer Holka smelled intoxicants on Mr. Smith. He did not see a bat or other object at the scene. Shanna Cox was present at the scene. When Officer Holka talked to Mr. Smith at the hospital later that night, Mr. Smith said he did not remember anything; that he believed that Mr. McCuller had assaulted him because he had stolen his girlfriend, Shanna Cox; but that he did not see Mr. McCuller attack him. [Trial 5/8/03, pp 167-181].

Gregory Thompson, who was employed by Mr. McCuller as a landscaper, testified that, in October of 2001, Mr. McCuller told him that he had assaulted Larry Smith. He said that Dan Hahn was present during this conversation and heard it. He elaborated that Mr. McCuller told him that he received a telephone call from Shanna Cox, assumed she was calling from a local bar, went there and beat Larry Smith when he came out. According to Thompson, Mr. McCuller graphically described punching and pulverizing Smith, and said he left him "half dead." When Mr. McCuller told the story, Thompson said he had "a lot of emotion," and was smiling and laughing, like he thought it was a big joke. Mr. McCuller only described using his fists, and did not mention a weapon. Thompson reported the matter to the police on November 11th, the same day he stopped working for Mr. McCuller because Mr. McCuller "shoved [him] on a job." He claimed that he quit the job and was not fired. He later agreed that he reported the matter on November 26th. [Trial 5/8/03, pp 127-139, 144-145].

Mr. Thompson acknowledged that Mr. McCuller gave him a job after he got out of jail, as a favor to Thompson's father. He felt that Mr. McCuller shorted his pay almost every week.

He denied being told in September to watch out for Smith coming around the business because Shanna Cox was staying there. He denied being upset with Mr. McCuller because Mr. McCuller told his father he had stolen some car parts from him. He also denied telling Dan Hahn that he was going to break into Mr. McCuller's business and poison Mr. McCuller's dog. He denied asking Mr. McCuller for the access code to his business. [Trial 5/8/03, pp 142, 148-156].

Detective-Sergeant Martin Barner testified that, on October 5, 2001, after Larry Smith was released from the hospital, Smith told him that, right before he was assaulted, he turned his head and saw Mr. McCuller in mid-swing coming down toward his head with an object such as a pipe or bat. Mr. Smith added that "Miss Cox was back staying with Mr. McCuller." Mr. Smith denied having any contact with Ms. Cox, and said he would never threaten her because he loved her. [Trial 5/9/04 pp 9-11, 37].

Detective Barner said he attempted to locate Ms. Cox and Mr. McCuller, but he was unable to reach them, and when he did reach Mr. McCuller, he said he was too busy to come it to make a statement. [Trial 5/9/04 pp 14-20]. On November 6th, Barner pulled Mr. McCuller over in front of his house. Mr. McCuller indicated that he was driving a vehicle that belonged to Ms. Cox, who he described as his live-in girlfriend. Mr. McCuller told Barner that Mr. Smith was threatening to kill him and Ms. Cox. Detective Barner had heard that Cox was living at a warehouse owned by Mr. McCuller, but Mr. McCuller was unable to provide the address of the warehouse. [Trial 5/9/04 pp 21-25, 37].

On November 23rd, Detective Barner was contacted by Gregory Thompson, who gave him a statement on November 26th regarding a conversation he said he had with Mr. McCuller concerning the incident. [Trial 5/9/04 p 29].

On November 30th, Detective Barner took a statement from Ms. Cox. She said the only information she had about the offense came from Larry Smith. She did not say that Mr. McCuller was at the bar on the evening in question. [Trial 5/9/04 pp. 39-40].

Daniel Hahn, who worked for Mr. McCuller, testified that he never heard Mr. McCuller say he had beaten Larry Smith. He added that Gregory Thompson was always complaining about work, that he was fired by Mr. McCuller as a result, and that he always told Hahn he was going to get even with Mr. McCuller. Thompson asked Hahn for the alarm code to Mr. McCuller's business. Also, Thompson kept some property at Mr. McCuller's business which he had stolen from his father. [Trial 5/9/04 pp 50-53].

The court sustained prosecutorial objections when the defense inquired (1) whether Mr. Hahn knew that the shop had been warned about Mr. Smith coming around; (2) how a plan had arisen to break into Mr. McCuller's shop; and (3) whether there was a plan to poison Mr. McCuller's dog. [Trial 5/9/04 pp 50-51].

Shanna Cox testified that, on the day of the incident, she and Larry Smith had been drinking all day, and that Smith had had three or four beers at the bar. In addition, she said that Smith used heroin, crack and methadone. Cox made a phone call to Mr. McCuller from the bar to talk to him about her truck. She did not tell him where she was or that she was with Mr. Smith. She and Smith were leaving the bar together, when she went to use the bathroom. Smith was lying on the ground when she came out into the parking lot. She asked someone to call 911, then she held Smith until the ambulance and police arrived. When the ambulance got there, he asked her what had happened. [Trial 5/9/04 pp 66-74, 93, 95].

Everyday, when Ms. Cox called the hospital, Mr. Smith asked her what had happened. On the third day, he threatened that, "if I was at Al's that me and Al were dead." He

communicated to her that, "I'm not going to stop until you talk to me," "I can drop all the charges against Al, if you want it, but I need some answers," "Otherwise I won't quit until he's in jail," "I would kill for you," "It ain't over, not by a long shot or actually six feet," and "You had better make up because time is running faster and faster." After Smith threatened her, and as a result of these communications, Ms. Cox became afraid and went to live at Mr. McCuller's warehouse. [Trial 5/9/04 pp 69, 78-80]. She filed a police report about his harassing her on November 3rd. She said she was not lovers with either Mr. McCuller or Mr. Smith, and she worked for Mr. McCuller as a landscaper and pet care provided. [Trial 5/9/04 pp 66-70, 101].

Mr. McCuller was convicted of assault with intent to do great bodily harm.

In his Sentencing Information Report, Mr. McCuller was placed on the D grid, in the C-IV cell, with a recommended minimum sentencing range of 10 to 28 months, as a 2nd habitual offender. [SIR, Appendix B]. However, based on sustained objections at the sentencing proceedings, he was moved to the B-IV cell, and his guidelines were amended to 5 to 28 months, which is a straddle cell. These guidelines included the following points: 10 points under Offense Variable 1, for "the victim was touched by any other type of weapon"; 1 point under Offense Variable 2, for "the offender possessed or used any other potentially lethal weapon"; and 25 points under Offense Variable 3, for "life threatening or permanent incapacitating injury occurred to a victim."

I. MR. MCCULLER WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT PRECLUDED HIM FROM INTRODUCING EVIDENCE TO ESTABLISH THE BIAS AND MOTIVE FOR FABRICATION OF A CRITICAL PROSECUTION WITNESS.

Standard of Review. Evidentiary decisions are reviewed for abuse of discretion. *People v Layher,* 464 Mich 756, 761; 631 NW2d 281 (2001). However, where decisions regarding the admission of evidence preliminary questions of law such as whether a rule of evidence or statute precludes admissibility, review is de novo. *Layher.*

Larry Smith was assaulted outside a bar and rendered unconscious. Initially, he did not know who had assaulted him. Several days later, when he learned that his girlfriend had gone to live with Mr. McCuller, he claimed that Mr. McCuller was the assailant. In an effort to buttress the charges and support of Mr. Smith's otherwise spurious claim, the prosecution offered the testimony of Mr. McCuller's former employee Larry Thompson, who claimed that Mr. McCuller told him he had beaten Smith.

In order to impeach Thompson's testimony, the defense attempted to introduce evidence that Thompson had a vendetta against Mr. McCuller. In particular, the defense sought to demonstrate that through Daniel Hahn that Thompson had intended to break into Mr. McCuller's business and also to poison his dog, after Thompson had denied these assertions on cross-examination. The court sustained prosecutorial objections to these efforts by the defense to elicit testimony which contradicted Thompson's on key impeachment matters, citing MRE 608 (b). [Trial 5/9/04 pp 50-51]. The trial court's erroneous exclusion of this evidence completely undermined Mr. McCuller's defense and deprived him of a fair trial. US Const, Ams V, XIV;

Const 1963, art 1, § 17; *Chambers v Mississippi*, 410 US 284, 302, 93 SCt 1038, 1049, 35 L Ed 2d 297 (1973); *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920, 1923; 18 L Ed 2d 1091 (1967).

In order to show witness bias, trial counsel must be allowed to probe the opposing party's witness about his relationships, dislikes, and self-interests. The United States Supreme Court, the Michigan Supreme Court, and the Michigan Court of Appeals have upheld this important right. *United States v Abel*, 469 US 45; 105 SCt 465; 83 Led2d 450 (1984); *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001); *People v. Minor,* 213 Mich App 682, 685; 541 NW2d 576, 579 (1995). Evidence that demonstrates that a witness is biased against the defendant or has a motive to fabricate charges against him is admissible, even if it is extrinsic evidence, and even if the evidence would be otherwise inadmissible. *Abel.*

In *United States v Abel,* 469 US 45; 105 SCt 465; 83 LEd2d 450 (1984), the prosecution sought to demonstrate the bias of a defense witness by establishing that he and the defendant were both members of the Aryan Brotherhood, "a secret prison gang which required its members always to deny the existence of the organization and to commit perjury, theft and murder on each member's behalf. *Id.* at 47. The defense sought to exclude that same evidence under FRE 608(b), the federal counterpart to MRE 608(b), which has precisely the same language, and which forbids the use of extrinsic evidence of specific instances of conduct as impeachment. The Court held that the fact that impeachment evidence might not have been admissible under FRE 608 (b) did not foreclose its admissibility to show bias:

> It seems clear to us that the proffered testimony with respect to Mills' membership in the Aryan Brotherhood sufficed to show potential bias in favor of respondent; because of the tenets of the organization described, it might also impeach his veracity directly. But there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered

> inadmissible; quite the contrary is the case. It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar. *Id.* at 56.

The Court in *Abel* held that the use of extrinsic evidence to prove a witness' bias was part of the "common law of evidence." Unlike categories of evidence which were excluded under the subsequent enactment of the rules of evidence, a challenge to the credibility of a witness based on bias can be established through collateral evidence, and the challenger is not required to "take the answer of the witness":

> Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, **dislike**, or fear of a party, or by the witness' **self-interest**. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. The "common law of evidence" allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to "take the answer of the witness" with respect to less favored forms of impeachment. See generally McCormick on Evidence...§ 40, at 89 [(3d ed. 1984)]; Hale, Bias as Affecting Credibility, 1 Hastings LJ 1 (1949). *United States v Abel, supra* at 52 (emphasis added).

Michigan Courts are in accord. Citing *United States v Abel,* the Court in *People v Layher,* 464 Mich 756, 764; 631 NW2d 281 (2001) held that evidence of bias is "almost always relevant." A proponent's attempt to discredit a witness' testimony by showing that the witness may be biased in favor of, or against, a party or witness, is highly relevant, particularly in cases like the present, where that witness is effectively the sole source of evidence that contradicts the accuser. Denying the factfinder this type of evidence undermines the truth-seeking process. *Id.* at 768.

In *People v Minor,* 213 Mich App 682, 685; 541 NW2d 576 (1995), the Court stated that "[a] witness' motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." Importantly, in a concurrence, Judge Sapala opined that the refusal of the trial court to permit cross-examination of a witness was clear error, and "so offensive to the maintenance of a sound judicial system that it should never be considered harmless." *Id.* at 213 Mich App at 690.

Likewise in *People v Lester,* 232 Mich App 262, 273; 591 NW2d 267 (1999), the Court stated that evidence of a witness' bias or interest in a case is highly relevant to her credibility.

The relevant facts in the instant case are indistinguishable from those in *Abel, Layher,* and *Minor*. Mr. McCuller, like the defendant in *Minor*, was not allowed to impeach the testimony of a prosecution witness. Mr. McCuller prooffered evidence that a prosecution witness, Mr. Thompson, had falsely testified that Mr. McCuller admitted to beating Mr. Smith. Mr. McCuller maintained that Mr. Thompson lied to get revenge against Mr. McCuller for firing him. The defense sought to demonstrate Mr. Thompson's bias and motivation to fabricate his story by introducing evidence from a co-worker, Mr. Hahn regarding Thompson's other efforts to obtain revenge against Mr. McCuller by breaking into his business and poisoning his dogs. Mr. McCuller was improperly precluded from establishing these matters, because Thompson's lack of credibility was pivotal to his defense.

This preserved, Constitutional error was not harmless beyond a reasonable doubt. *People v Carines,* 460 Mich 750, 775; 597 NW2d 130 (1999); *People v Anderson (After Remand),* 446 Mich 392; 521 NW2d 538 (1994). As in *Minor*, the inability to impeach witness testimony was extremely damaging to Mr. McCuller. Mr. McCuller was not even charged in the attack until after Mr. Thompson came forward with damaging accusations. Without the strength of Mr.

Thompson's testimony, Mr. McCuller in all likelihood, would not have been convicted, nor possibly ever charged. Mr. Smith, the victim, stated at the hospital that he had no idea who beat him. Indeed, he did not identify Mr. McCuller as the attacker until four days after the attack, once he was provoked by jealousy.

An error is harmless beyond a reasonable doubt when it has had no effect on the verdict. *People v Bigge,* 297 Mich 58, 72; 297 NW2d 70 (1941). This error must have affected the verdict, as it deprived the trier of fact of consideration of facts which clearly would have demonstrated a principal prosecution witness' overall malice, vindictiveness, jealously and hostility against Mr. McCuller, especially where the complaining witness himself was not able to soundly identify Mr. McCuller as his assailant.

Mr. McCuller was denied a fair trial and his conviction must be overturned.

II. MR. MCCULLER IS ENTITLED TO RESENTENCING WHERE HIS SENTENCE WAS UNLAWFULLY AND UNCONSTITUTIONALLY ENHANCED ON THE BASIS OF UNPROVEN ALLEGATIONS; WHERE HIS MINIMUM SENTENCE CONSTITUTES A DEPARTURE FROM THE CORRECT SENTENCING GUIDELINES SCORE; AND WHERE UNDER HIS CORRECT GUIDELINES HE MUST BE GIVEN AN INTERMEDIATE SANCTION SUCH AS PROBATION.

Standard of Review. Application of the statutory sentencing guidelines presents a question of law that is reviewed de novo by this Court. *People v Libbett*, 251 Mich App 353; 365; 650 NW2d 407 (2002). A preserved challenge to the scoring of the sentencing guidelines is reviewed for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003).

Issue Preservation. The challenge to the scoring of OV 3 was adequately preserved by Mr. McCuller's post conviction motion for resentencing. MCL 769.34 (10); *People v Kimble,* 470 Mich 305; 684 NW2d 669 (2004). However, a remand for reconsideration of that issue is needed in light of the subsequent decision in *Blakely v Washington,* 542 US ___; 124 SCt 2531; 159 L Ed 2d 403 (2004), which governs the issue. The challenges to the scoring of OV 1 and OV 2 are adequately preserved by raising them for the first time in this Brief and requesting a remand for resentencing. *Kimble, id.* Just like the error presented for the first time in the Court of Appeals Application in *Kimble,* the error of scoring these variables constitutes plain error affecting Mr. McCuller's substantial rights. *People v Carines,* 460 Mich 750; 597 NW2d 130 (1999). As the Court stated in *Kimble,* "[i]t is difficult to imagine what could affect the fairness, integrity and public reputation of judicial proceedings more than sending an individual to prison and depriving him of his liberty for a period longer than authorized by the law." *Kimble.*

Raymond McCuller was convicted of assault with intent to commit great bodily harm, based on allegations that he beat Larry Smith with an object such as a bat, pipe or club. As a result of the assault, Mr. Smith said he incurred a broken nose, broken cheek bone, broken right eye socket, fractured head, right lower teeth knocked out, a collapsed right inner ear wall, a closed head injury and a concussion. No medical evidence was introduced to corroborate Smith's representations concerning the nature and extent of his injuries.

In his Sentencing Information Report, Mr. McCuller was placed on the D grid, in the C-IV cell, with a recommended minimum sentencing range of 10 to 28 months, as a 2nd habitual offender. [SIR, Appendix A]. However, based on sustained objections at the sentencing proceedings, he was moved to the B-IV cell, and his guidelines were amended to 5 to 28 months, which is a straddle cell. [Sent 6/17/03, pp 2-3].

These guidelines were partially based on erroneous and unsubstantiated points assessed as follows: 10 points under Offense Variable 1, for "the victim was touched by any other type of weapon"; 1 point under Offense Variable 2, for "the offender possessed or used any other potentially lethal weapon"; and 25 points under Offense Variable 3, for "life threatening or permanent incapacitating injury occurred to a victim."

A defendant has a due process right to be sentenced on the basis of accurate information. *Townsend v Burke*, 334 US 736, 740; 68 SCt 1252; 92 LEd 1690 (1948). The United States Supreme Court recently held in *Blakely v Washington, supra* that it is a violation of due process to impose an enhanced sentence based on facts neither admitted by the defendant nor found by a jury. Mr. McCuller is entitled to resentencing as a result.

The defendant in *Blakely* pled guilty in the state of Washington to second degree kidnapping, an offense which carried a statutory maximum sentence of 10 years. However, based

on factors extant in Blakely's case, the "standard range" for the sentence was 49 to 53 months. Washington law permitted the judge to exceed the "standard range" only for substantial and compelling reasons. The judge exceeded the "standard range" based on finding that Blakely had treated the kidnapping victim with deliberate cruelty, and sentencing him to 90 months' imprisonment. The Court held that the sentence violated due process because Blakely had not admitted to facts supporting the departure, nor had such facts been determined by a jury. *Blakely,* 124 SCt at 2537. The Court elaborated that:

> Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the "unanimous suffrage of twelve of his equals and neighbours," Blackstone, Commentaries, at 343, rather than a lone employee of the State. *Id.* at 2543.

The decision in *Blakely* was based on the holding in *Apprendi v New Jersey,* 530 US 466, 490; 120 SCt 2348; 147 L Ed 2d 435 (2000) that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." For purposes of the *Apprendi* ruling, the Court in *Blakely* held that the maximum sentence that can be imposed "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in a jury verdict or admitted by the defendant.*" *Id.* at 2537 [emphasis in original]. The Court further elaborated that:

> [T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to punishment

> ... and the judge exceeds his proper authority. *Id.* [emphasis in original][citations omitted].

The central point of *Blakely* is that where a legislature has conditioned punishment on the finding of certain facts, judicial fact finding (and, therefore, the resultant sentence) is **without authority** because it intrudes on the province of the jury:

> [T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. **It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury.** *Blakely* [emphasis added].

The relevant facts in the instant case are indistinguishable from those presented in *Blakely.*

The crime of which Mr. McCuller was convicted requires proof of (1) attempt or threat with force or violence to do corporal harm to another, which is an assault; and (2) intent to do great bodily harm less than murder. *People v Parcha,* 227 Mich App 236; 575 NW2d 316 (1997); MCL 750.84. Thus a verdict of guilt for this offense necessarily required proof of these elements, and nothing more. In convicting Mr. McCuller for this offense, the jury did not find proof beyond a reasonable doubt of any of the factors underlying Offense Variables 1, 2 and 3. Accordingly, and in accordance with *Blakely,* those variables must be scored at zero. A scoring decision must be reversed if no evidence exists to support it. *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002).

Mr. McCuller received 10 points under Offense Variable 1, for "victim was touched by any other type of weapon," i.e. other than the specifically enumerated weapons, which do not include a bat, pipe or club. MCL 777.31 (1)(d). Zero points are assessed where "no aggravated use of a weapon occurred." MCL 777.31 (1)(f). Mr. McCuller received 1 point under Offense

Variable 2, for "the offender possessed or used any other potentially lethal weapon," again, that is, other than the specifically enumerated weapons, which do not include a bat, pipe or club. MCL 777.32 (1)(f).

Since the jury made no requisite finding beyond a reasonable doubt that the victim was touched by a weapon, nor that Mr. McCuller possessed or used any weapon in the assault, Mr. McCuller should receive no points under both Offense Variable 1 and 2. Indeed, the claim that the assailant used a weapon was very contentious, since (1) police found no weapon at the scene; (2) Gregory Thompson, the witness to whom Mr. McCuller allegedly confessed in graphic detail, specifically stated that Mr. McCuller described beating the complainant with his fists alone, and that he did not describe using a weapon in committing the offense; and (3) there was no medical evidence indicating that the complainant's injuries were consistent with the use of an object. Thus, Mr. McCuller should receive no points under either Offense Variables 1 or 2.

Mr. McCuller received 25 points under Offense Variable 3. According to the statute, 25 points are appropriate where "life threatening or permanent incapacitating injury occurred to a victim," and no points are scored where "no physical injury occurred to a victim. MCL 777.33 (1)(c) and (1)(f). Since the jury did not find, beyond a reasonable doubt, that Larry Smith incurred life threatening or permanent incapacitating injury, then the assessment of 25 points under this variable violates *Blakely.* It matters not that Mr. Smith testified to injuries that could be found to meet this definition. The nature and extent of Mr. Smith's injuries was not an element of the conviction offense. Evidence that those injuries were in fact life threatening or permanently incapacitating was not even introduced Accordingly, Mr. McCuller should be assessed no points under Offense Variable 3.

Without these erroneous and unconstitutional guidelines points, Mr. McCuller would fall in the B-I cell, with guidelines of 0 to 11 months, as a 2nd habitual offender. Thus, the minimum sentence of 2 years' imprisonment he received constitutes an unlawful departure from the properly scored guidelines, and he must be resentenced. MCL 769.31 (c). The Legislative sentencing guidelines require that the court impose a sentence within the guidelines range unless a departure is permitted. MCL 769.34 (2); *People v Hegwood,* 465 Mich 434, 439; 636 NW2d 127 (2001). A court may depart from the guidelines only if with substantial and compelling reasons. MCL 769.34 (3); *People v Armstrong,* 247 Mich App 423, 425; 636 NW2d 785 (2001). No departure is justified in this case, since Mr. McCuller did not admit to any facts supporting departure reasons, and none were decided by a jury. *Blakely, supra.*

Moreover, Mr. McCuller is particularly aggrieved, because, under his proper guidelines of 0 to 11 months, he belongs in an intermediate cell, which means that any prison sentence is a departure. Whenever the high end of a defendant's appropriate guidelines is less than 18 months, he must be given an intermediate sanction, which is some form of punishment less serious than imprisonment:

> "Intermediate sanction" means probation or any sanction, **other than imprisonment in a state prison or state reformatory,** that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following:
>
> (i) Inpatient or outpatient drug treatment.
> (ii) Probation with any probation conditions required or authorized by law.
> (iii) Residential probation.
> (iv) Probation with jail.
> (v) Probation with special alternative incarceration.
> (vi) Mental health treatment.
> (vii) Mental health or substance abuse counseling.
> (viii) Jail.
> (ix) Jail with work or school release.

(x) Jail, with or without authorization for day parole under 1962 PA 60, MCL 801.251 to 801.258.
(xi) Participation in a community corrections program.
(xii) Community service.
(xiii) Payment of a fine.
(xiv) House arrest.
(xv) Electronic monitoring.

MCL 769.31 (b).

Unless the judge specifically and properly intends to exceed the guidelines, the statute expressly provides that the appropriate sentence for an intermediate sanction cell cannot exceed 12 months in jail, and cannot include a term of imprisonment:

> If an upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set for in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. MCL 769.34 (4)(a).

The Supreme Court elaborated on this aspect of the sentencing guidelines in *People v Stauffer*, 465 Mich 633, 634-636; 640 NW2d 869 (2002):

> As the guidelines were scored in this case, the high end of the range for the minimum sentence was seventeen months. The circuit court duly imposed a minimum prison sentence of seventeen months (later reduced to sixteen months). **At first analysis, this sentence, which did not exceed the upper limit of the guidelines range, would appear not to be a departure and, thus, would appear not to require the articulation of a substantial and compelling reason.**
>
> However, the statutory guidelines have a number of characteristics not present in the earlier judicial guidelines. One is the rule stated in M.C.L. § 769.34(4)(a):
>
> > If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in [M.C.L. § 777.1 *et*

> *seq.*] is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.
>
> ***An "intermediate sanction" can mean a number of things, but it does not include a prison sentence.*** **Thus M.C.L. § 769.34(4)(a) required the circuit court here to set forth a substantial and compelling reason for imposing a prison sentence, even though its minimum length (sixteen or seventeen months) did not exceed the upper end of the range established by the guidelines.**
>
> As indicated, we highlight this requirement of the guidelines, since it may be unfamiliar or confusing to some courts or practitioners.
>
> [Footnotes omitted][Emphasis added]

Just as in *Blakely,* where the consideration of disputed variables resulted in the three year enhancement in that defendant's sentence, the consideration of unsubstantiated allegations in Mr. McCuller's case, which resulted in a two year minimum prison sentence instead of an intermediate sanction such jail or probation, cannot withstand constitutional scrutiny.

The bedrock Sixth Amendment principle of *Blakely* was reaffirmed by the United States Supreme Court in *United States v Booker and Fanfan,* ___ US ___ (2005)(#s 04-104, 04-105, 1-12-05), cases involving the federal sentencing guidelines.[1] In *Booker* the sentencing judge did not "depart" above the guidelines but increased the applicable range on the basis of facts found at a sentencing hearing by a preponderance of the evidence and imposed sentence within that increased range. In *Fanfan* the sentencing judge similarly found facts by a preponderance of the

[1] The *Booker* Court further held that *Blakely* applies to all cases where the judgment is not final. Opinion of the Court by Justice Breyer, p 25.

evidence that increased the applicable guidelines range, but sentenced within the base range instead on the basis of *Blakely*. The Supreme Court noted that there was no constitutionally significant distinction between the state guidelines scheme at issue in *Blakely* and the federal sentencing guidelines (Stevens, J., p 8); and that the enhanced sentence in *Booker* violated his Sixth Amendment rights. The Court reaffirmed:

> [O]ur holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. (Opinion of the Court by Justice Stevens, p 20).

Mr. McCuller acknowledges that the Michigan Supreme Court has recently stated in a footnote in *People v Claypool,* 470 Mich 715, 730; 684 NW2d 278 (2004), that *Blakely* does not apply to the Michigan sentencing guidelines. However, the issue in *Claypool* was whether a trial court could use sentencing entrapment as a factor justifying a downward departure from the sentencing guideline range. The Court's comments about *Blakely* are therefore *dicta*, since they were not germane to the issue presented in that case, and therefore are not precedentially binding. In *In re Cox Estate,* 383 Mich 108, 117; 174 NW2d 558 (1970), the Michigan Supreme Court observed that,

> When a court of last resort intentionally takes up, discusses and decides a question *germane* to, though no necessarily decisive of, the controversy, such decision is not *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.

Webster's Seventh New Collegiate Dictionary defines "germane" as "closely akin" or "having a significant connection." The issue in *Blakely* was the legality of increasing or enhancing a sentence beyond that which was commensurate with the jury verdict as to the requisite elements of the conviction offense. Since the Court's comments regarding *Blakely,*

relegated to a footnote, were in no way "akin to" or "connected with" the issue of a sentence enhancement, but rather pertained to a sentence reduction, which has none of the attendant concerns regarding the violation of the right to have jury decide the facts which will affect punishment, those comments are mere *dicta,* and as such, are not binding precedent.

The prosecution may still argue that *Blakely* does not apply to the Michigan guidelines because, unlike the Washington guidelines treated in *Blakely* and the federal guidelines treated in *Booker,* which provide for a single sentence, the Michigan guidelines provide a range for the minimum sentence, while the maximum sentence in Michigan is set by law. Thus, the argument goes, enhancement of the minimum sentence has no effect on the maximum sentence, and therefore does not violate *Apprendi* or *Blakely.* Whatever the merit of this argument in the typical circumstance involving a minimum and a maximum sentence, it does not obtain in the instant case, where Mr. McCuller ought to have been placed in an intermediate cell. An intermediate cell -- just like the sentences provided under the Washington guidelines in *Blakely* and the federal guidelines in *Booker* -- provides for but one sentence, such as probation or jail, and does not permit a sentencing range consisting of a minimum and a maximum sentence. Therefore, the argument that *Blakely* does not apply where the defendant belongs in an intermediate sanction is fallacious.

Because the issue in *Blakely* was not presented to the Court in *Claypool,* litigants have been deprived of the important opportunity to fully brief and argue whether and to what extent the Washington sentencing guidelines treated by the *Blake*ly decision are distinct from or similar to those presented under the Michigan guidelines. Whatever the arguments may be in that regard, however, it is clear that the situation in the present case, in which Mr. McCuller must properly be placed in an intermediate cell, is precisely the same as that presented in *Blakely.*

Under these circumstances, Mr. McCuller must be resentenced to an intermediate sanction for assault with intent to commit murder.

Mr. McCuller prays for a remand for resentencing.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant leave to appeal and reverse his conviction and/or remand for resentencing.

Respectfully submitted,

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BY: _____

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